

NO. 49259-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT VESTRE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable M. Mark McCauley, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant Robert Vestre was denied his right to a unanimous jury verdict.

Issue Pertaining to Supplemental Assignment of Error

Where the state presented evidence of two acts the jury could have relied upon to convict Vestre of burglary, and there was no election by the prosecutor or instruction to the jury it must be unanimous as to the act relied upon, was Vestre denied his right to a unanimous jury verdict?

B. FACTS PERTAINING TO SUPPLEMENTAL ISSUE

1. Trial Testimony

As noted in the opening appellate brief, the state accused Vestre of burglarizing the Grays Harbor Historic Seaport building, on or about June 14-15, 2015. CP 1-3, 9-10. At trial, Crista Arends testified she and her daughter Sarah Arends<sup>1</sup> were driving through Aberdeen on their way back to Maple Valley when they noticed the apparently abandoned Seaport Authority and decided to break in. RP 176. When they went inside, they saw it had wire they could strip. RP 170, 176.

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<sup>1</sup> To avoid confusion, Sarah Arends will be referred to by her first name.

Arends claimed she called Vestre and his girlfriend Christine Ortiz, who lived down the road from her and Sarah in Maple Valley, to come help them. RP 171, 174, 176, 182. According to Arends, when Vestre and Ortiz arrived, they all worked together to remove the wire. RP 170-71. Arends claimed Vestre took the interior doors and box to an antique safe that was inside the Seaport building.<sup>2</sup> RP 210-11.

Arends testified they loaded her truck with the wire, drove to Maple Valley and unloaded it at her house. RP 191, 198. Arends claimed Vestre took some items separately to his place. RP 198.

Arends testified she, Vestre and Ortiz returned to the Seaport building in Arends' truck the next day and "did the same work." RP 201. After loading the truck, they drove to South Bend. RP 201.

Around 9:45 a.m. on June 15, 2015, South Bend police chief David Eastham responded to the site of a black pickup truck parked at Jackpot Industries in South Bend. RP 62-64, 66, 74. In the truck bed, Eastham observed parts of a heat pump/air conditioning unit, assorted metal materials, a 300-400 pound of lead, electrical

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<sup>2</sup> The director of the Grays Harbor Seaport testified that on the inside of the antique safe were a set of paintings, which were missing after the burglary. RP 80-81.

conduit boxes, sailing equipment, including wooden masts or yardarms. RP 63, 65.

Vestre agreed to speak with Eastham after Eastham read him his rights. RP 71. According to Eastham, Vestre said he, Arends and Oriz picked up the items in the back of the truck in Aberdeen. RP 71. When Eastham asked if Vestre's fingerprints might be found on a pair of bolt cutters in the truck, Vestre said he might have moved them while they were loading items into the truck. RP 71.

Deputy Keith Peterson was assigned to investigate the Seaport break-in several days later. RP 113. He spoke to Arends while she was in custody. RP 122, 202. Thereafter, he obtained search warrants for two pieces of property in Maple Valley where he believed property from the Seaport would be located. RP 115, 123.

The first location Peterson searched was a piece of property that had a small trailer on it and a black Jetta parked out front. RP 115. Inside the trailer, Peterson found a pawn ticket for Vestre and a letter addressed to Ortiz, but at a different address. RP 118. Peterson also found a photograph depicting Vestre and some other individuals. RP 118.

In the trunk of the Jetta, Peterson found some paintings. RP 121. He also located two safe door panels inside the travel trailer on the bed, underneath the sheet. RP 121.

The second location Peterson searched was Arends' residence, just up the road a half-mile. RP 122. Sarah was there with several other people. Peterson found some paintings similar to the ones he found in the Jetta, as well as drugs and 400 pounds of copper wire in a shed behind the house. RP 123.

## 2. Instructions and Closing Argument

The parties and court did not propose, discuss or give an instruction informing the jury it must be unanimous as to which act of unlawfully entering or remaining it relied upon in order to convict. CP 17-25, 32-42; RP 220-239.

In the state's first closing, the prosecutor argued there were two break-ins of the Seaport Authority. RP 265 ("the first time that they broke into that house [sic] was the day before they got arrested."); RP 266 ("and then they went up to Maple Valley with a load and then went back down and got some more stuff and then went to South Bend."); RP 268 ("They go back down and pick up another load of stuff"). He also argued Arends' testimony about



Vestre's participation was corroborated by the fact police found "the safe doors, in his own trailer." RP 274.

Defense counsel argued there were reasons to doubt Arends' credibility. RP 277-79. Defense counsel also argued Sarah could have moved some of the stolen property from her and Arends' home to the trailer Vestre was reportedly living in. RP 282. Sarah had remained out of custody while the others were incarcerated and therefore had the opportunity, as Peterson did not search either residence until several days after Vestre and Arends' arrest. RP 282. Moreover, Arends and her daughter had a motive to frame Vestre. RP 285. Finally, defense counsel argued there was no evidence Vestre unlawfully entered the Seaport the second day when they went back. RP 285.

In rebuttal closing, the prosecutor argued that even if Vestre did not enter the building on the second day, the jury could convict him as an accomplice for helping Arends load the truck. RP 292.

C. SUPPLEMENTAL ARGUMENT

VESTRE WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

According to the state's theory, Vestre committed burglary on two separate occasions. The prosecutor did not elect any

specific act for the jury to rely upon. Nor did the court instruct the jury it must be unanimous as to the act relied upon. As a result, not all jurors may have relied on the same act to convict. This process failed to ensure Vestre's right to a unanimous jury verdict and requires reversal of his burglary conviction.

An accused person has the constitutional right to a unanimous jury verdict. Const. amend. 6; Const. art. 1, § 22; Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1995); United States v. Gonzalez, 786 F.3d 714, 716-17 (9<sup>th</sup> Cir. 2015); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). When evidence is presented of multiple acts, any one of which could constitute the charged crime, the court must ensure the jury is unanimous as to which of the acts was committed. Petrich, 101 Wn.2d. at 572; State v. Furseth, 156 Wn. App. 516, 517-18, 233 P.3d 902 (2010). Jury unanimity may be preserved either by instructing the jury it must unanimously agree which act has been proved or by the prosecutor clearly electing one of the acts to rely on. Petrich, 101 Wn.2d at 572.

A unanimity instruction is required whenever the case is a multiple acts case. United States v. Echeverry, 719 F.2d 974, 975 (9<sup>th</sup> Cir. 1986); Furseth, 156 Wn. App. at 520 (citing State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)). A multiple acts prosecution occurs when several acts are alleged and any one of them could constitute the crime charged. Furseth, 156 Wn. App. at 520 (quoting Kitchen, 110 Wn.2d at 411).

Under RCW 9A.52.030:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Thus, to be guilty of burglary, the defendant must have:

(1) Unlawfully, and with intent to commit a crime against a person or property,

- a) entered a building; or
- b) remained in a building.

State v. Brooks, 113 Wn. App. 397, 399, 53 P.3d 1048 (2002). The unit of prosecution is the act of entering or remaining. Brooks, 113 Wn. App. at 400.

The state presented evidence through Arends' testimony that Vestre unlawfully entered the Seaport Authority on the morning

of June 14 (before returning to Maple Valley), as well as the morning of June 15 (prior to their arrest). Thus, the prosecutor presented two separate acts upon which the jury could have relied to convict. The prosecutor made no election in closing argument and no unanimity instruction was given. This was error and failed to ensure a unanimous jury verdict.

The error in failing to require unanimity in a multiple acts case stems from the possibility that some jurors may have relied on one act or incident and some jurors may have relied on a different act, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. Bobenhouse, 166 Wn.2d at 893. The failure to ensure jury unanimity is constitutional error, and reversal is required unless the state proves beyond a reasonable doubt that the error was not prejudicial. State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

The error is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between the multiple acts. Bobenhouse, 166 Wn. 2d at 894-95 (discussing State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). Here, there was a basis for the jury to discriminate between the first break-in and the second. Regarding the first, the state presented corroboration – in

the safe paintings found at his reported residence – that he must have entered the building. With regard to the second break-in, however, there was no corroboration, as defense counsel argued in closing and the state seemingly conceded. Thus, it is possible some jurors may have thought the evidence concerning the second break-in was flimsy as to Vestre. However, other jurors may have bought the prosecutor's argument that he was still guilty as an accomplice for loading the truck.

The State cannot meet its burden to prove that error in failing to ensure a unanimous jury verdict was harmless beyond a reasonable doubt. This Court should therefore reverse Vestre's conviction. State v. Petrich, 101 Wn.2d at 569.

D. CONCLUSION

Because Vestre was denied his right to a unanimous jury verdict, his burglary conviction must be reversed.

Dated this 14<sup>th</sup> day of June, 2017

Respectfully submitted

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